CITY OF EDMONDS

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HEARING EXAMINER

DAVE EARLING
MAYOR

BEFORE THE HEARING EXAMINER FOR THE CITY OF EDMONDS

RE: Richard and Carol Megenity Appeal APL20110005	APPEAL OF NOTICE OF VIOLATION AND MONETARY FINE

Summary

Richard and Carol Megenity appeal a Notice of Violation and Monetary Fine issued as a result of the unauthorized cutting of three trees in critical areas buffers on City of Edmonds right of way. The $9,000 fine imposed by the Notice of Violation is reduced to $7,000, because there is insufficient evidence in the record to support a necessary finding that two of the three trees in question are three or more inches in diameter. The replanting plan required by the Notice of Violation is eliminated. Although a replanting plan is certainly desirable from the standpoint of mitigating damage to the Launcefords, there is simply no compelling evidence to refute the site specific conclusions made by the Appellants' arborist that planting is unnecessary and not feasible due to space limitations. It is determinative that the City's own arborist recommended against replanting as well.

Testimony

[This summary of testimony is not to be construed as any finding made by the Examiner. It is merely a summary of what was said so that the reader may understand what was presented.]

Mr. Favero Greenforest (Seattle, WA 98118) testified that he had a BA in science, an MA in horticulture, and is a certified arborist. Rick Megenity contacted him on June 27, 2012 to evaluate the trees across the street from his property. He stated that he went out to the property and did an inventory of the trees in an area adjoining Olympic View Drive that was 85 feet long and 20 feet deep and identified 18 trees and shrubs in that sloped area as well as observed the English ivy that covered the ground in the area.

Mr. Greenforest stated that all the trees and the ground cover that he examined were very healthy and that there was very little room on the site to put new vegetation in. His own research revealed that vegetation drastically reduces noise levels. He thought the vegetation had several healthy years left and was not causing any soil erosion. He believes that adding plants to the area would be unnecessary to help to reduce soil erosion and/or to protect the slope because the ivy already sufficed, and he stated that adding Evergreen huckleberry as the City recommended would not provide very much screening because the shrub is not very tall.

Under cross-examination from the City of Edmonds, Mr. Greenforest stated that he does not have the actual expertise to state whether or not the tree cutting in that area made the steep slope stable and he does not have the expertise needed to determine whether the tree cutting affected the noise level.

Mr. Richard Paul Megenity (18715 Olympic View Drive, Edmonds, WA 98020) testified that in January 2010 he and his wife went to the Planning Department to find out how the City processed requests for tree cutting. They spoke with Kernen Lien about how they could go about having trees that had grown into the power lines across the street trimmed. They were told the Planning Department could not help them and they ought to go to the Public Works Department. They were not provided any other information. Mr. Megenity stated that they went to the Public Works Department the following workday and asked Tod Mole the same question. They were told that the Public Works Department could not help them but they should contact the Snohomish County Public Utility District. The same week Mr. Megenity went to the Public Utility District.

Under questioning, Mr. Megenity stated that he wanted to prune the trees for view enhancement and for utilities, because he was concerned about losing power when trees toppled onto the power lines during the winter.

Mr. Megenity stated that the Snohomish County PUD contacted him two or three weeks after he called them and told him that they had visited the site and that they do not trim individual tracts. They had been to Olympic View Drive as recently as 2005 to trim trees and did not intend to visit that site or do any trimming in 2011. Mr. Megenity was not referred to anyone else. He stated that he wrote a letter to his neighbors before he went to the Planning Department notifying them that he was interested in trimming the treetops. He did not receive a response from the Launcefords, but he received an immediate response from other neighbors, George and Linda Murray. He said the Murrays had no objection to the trees being trimmed. He spoke with Mrs. Launceford on February 13, and she said she understood what they wanted to do because they cut trees to enhance their view. It was shortly after this conversation that he received the call from the PUD that said they were not

ready to trim the trees that year. Mr. Megenity sent another letter to the Launcefords that he intended to contact a few contractors about trimming trees. He sent a third letter when he decided to hire Eco Tree Northwest as the contractor, but did not receive a response from the Launcefords.

Mr. Megenity stated that he told the contractor to trim the trees at a height that would maintain screening, privacy, and sound buffer and to trim the trees at the same height as the PUD. They did as he requested partly in March and partly in May. He did not receive any objections from anyone between the trimming in March and the trimming in May. He had no other work done in the area. He testified that he went out to the area himself in January 2012 and tried to trim off a few branches from the ground with a pole saw. He spoke with Mrs. Launceford, who asked him what he was doing, and he told her that he was trimming the new growth to maintain the trimming from the previous year.

Mr. Megenity stated that he received a letter in February 2012 from the City that told him that he should not cut any further and he should submit an arborist report to determine whether the cutting was routine maintenance. He hired Dan Kraus, who said that the trees were growing healthily and vigorously and that he would consider the trims that were done to be routine maintained. Mr. Megenity supplied the report to the City. According to Mr. Megenity, they asked for a more detailed report, and he submitted a second report. He stated that the Planning Department sent him a notice of violation and a monetary fine of nine thousand dollars, which shocked him. The letter said he had ten days to seek an appeal. He asked the Planning Department for an extension to decide whether or not they would pay the fine or seek an appeal, but they told him that was not possible. Mr. Megenity hired attorney Matt Cruz. Mr. Megenity stated that the City never provided him any handouts about the City policies on tree cutting before he hired the contractor to trim the trees near the power lines.

Mr. Megenity stated that he did research on similar cases after he appealed. He found a case in 2012 in which fir trees were removed off a slope without a permit and the fine was nine hundred dollars. The City staff objected to this testimony as hearsay because the circumstances behind these cases were not known. The hearing examiner noted the objection but overruled. Mr. Megenity stated that he spent around eighty five hundred dollars on this appeal.

Under cross-examination from the City, Mr. Megenity stated that the trees he cut were not on his property and that he never received permission or objection from the City about trimming the trees. He stated that he was not aware that the City had a tree code that assigned fines for trees that are trimmed without a permit.

Mr. Megenity testified that when he said that he came away from his meeting with Mr. Lien under the impression that he adopted a "don't ask, don't tell" approach he meant that he thought many people trimmed trees with and without permits. The contractor told Mr. Megenity that he did this work all the time. Mr. Megenity believed that he could cut the trees because he had not been told that he could not cut them, and the neighbors did not object. He stated that he never asked Mr. Lien whether he could cut the trees.

Under re-direct from his attorney, Mr. Megenity stated that he never discussed whether or not he needed a permit to trim the trees with any of the contractors with whom he spoke. He stated that, after receiving a notice of violation from the City, he asked Mr. Lien whether this would have happened if the City had not received a complaint, and Mr. Lien said that it would not have, which is why Mr. Megenity believed the City adopted a "don't ask, don't tell" approach.

Mrs. Carol Megenity testified that she went with her husband to speak to the Planning Department about trimming the trees, and they did not receive any guidance. They were referred to Public Works, where they did not receive any guidance. They were never provided with any codes or handouts. She stated that they were never referred to the City website, but they went onto it when they received the notice of violation, and they were overwhelmed with the codes.

Mrs. Megenity stated that they were not aware about the codes until after they received the notice of violation. She stated that they tried to have the contractors trim the trees according to their understanding about the PUD requirements. They specifically asked the contractor not to cut into any privacy foliage or sound barrier foliage. Mrs. Megenity stated that she believed the contractor picked up the ivy that fell from his trimming and put the ivy back up into the area to help with the privacy and the sound buffing. She stated that from their house they cannot really see the Launcefords' house through the trees. As a gardener, she believes that trimming trees encourages growth, and she stated that this year there seemed to be more growth in the area.

Mrs. Megenity stated that the first time the Launcefords complained was in January 2012 when her husband was trimming the trees and Mrs. Launceford confronted him. According to Mr. Megenity, he offered to stop if he was bothering Mrs. Launceford, and he did. Under cross-examination from the City, Mrs. Megenity testified that they never received permission from the City to trim to trees.

Kernen Lien, City of Edmonds planner, testified that he worked with the Planning Department, and he showed infrared pictures of the site, stating that the trees that were topped were within the City of Edmonds right-of-way as well as in an area that was steeply sloped at about forty-seven percent, which qualifies the site as a landslide hazard area according to ECDC 23.80.020, thus the cutting in the area violated the ECDC 23.40.220 Allowed Activities within Critical Areas as well as the ECDC 23.80.040 Allowed Activities within Geologically Hazardous Areas. Also, an ECDC 18.60.000 Right-of-Way Construction Permit was required, which is why the tree trimming violated three separate sections in the City code.

Mr. Lien stated that alterations in an area like this site require a critical areas report, as detailed in ECDC 23.40.220. ECDC 23.40.320 defines alteration as including pruning, limbing, or topping. The activity in this site was not allowed according to ECDC 23.40.220. Mr. Lien stated that a letter is generally handed out to customers that come to the Planning Department to ask about tree cutting permits. He stated that he did not remember the encounter with Mr. and Mrs. Megenity, but what would happen is that, as soon as someone came to the Planning Department counter with questions about cutting trees in a right-of-way area, the Planning Department would refer them to engineering.

He stated that engineering would refer them to Public Works and to Todd Moles, and Todd Moles would go out to the site and, seeing the power lines, would refer them to the Snohomish County PUD.

Mr. Lien submitted the notice of appearance of Timothy Farley, the Megenitys' attorney, as Exhibit 12; the first arborist report from Dan Kraus as Exhibit 13; and the comments from neighboring property owners after the staff report was prepared, including an e-mail from Karen Dwyer, an e-mail from Susan Emmonds, and a letter from Chrystal Lanning as Exhibit 14. Mr. Lien submitted pictures of the site taken at various times as Exhibit 15, aerial photographs of the site as Exhibit 16, and a PUD packet of information with a letter from the PUD about what they found at the site last Thursday as well as supporting documentation and information on standard cutting procedures as Exhibit 17.

Mr. Lien stated that the Megenitys would have been routed to the proper authorities from the Planning Department counter to engineering to Tod Moles with Public Works and to Snohomish County PUD. He stated that in the PUD letter it was noted that, after being contacted by the Megenitys, the PUD had determined that there was no need at the time to perform any trimming because the safety around the power lines was adequate, and they would be cycling through the area to top the trees in another year or two. Mr. Lien stated that the Megenitys never received permission from anyone for the tree trimming, and it was a clear violation for the Megenitys to cross the road and to cut the trees. He stated that the Megenitys had testified that they wanted to enhance the view, and that was not a sufficient reason to trim the trees. Had they applied for a permit, it would not have been granted.

Mr. Lien stated that there were three arborist reports, two from Mr. Kraus and one from Mr. Greenforest, and there was some inconsistency between the reports. The City based their notice of violation on the reports from Mr. Kraus. Mr. Lien stated that Mr. Greenforest said he observed that three trees among eighteen in the area were cut, whereas Mr. Kraus said that most trees were cut but only three trees were cut beyond what had previously been cut. With those reports, the staff is unable to determine how many trees were cut, and the reports do not identify which trees were cut.

Mr. Lien stated that the PUD said the cuts done by the Megenitys were not the type that the PUD would have done. The PUD would not have trimmed as far from the power lines. Mr. Lien explained the pictures of the site from Exhibit 15. He stated that the PUD was unable to determine whether any trees were actually removed.

Mr. Lien stated that fines were based upon the first two arborist reports that were received. He noted that the City recently increased the fines for tree cutting violations in part to discourage activities like these from happening. The fines are detailed in ECDC 18.45.07. A tree less than three inches in diameter can be fined up to one thousand dollars, and a tree greater than three inches in diameter can be fined up to a three thousand dollars. The fine is tripled for trees located in a right-of-way or critical area.

Mr. Lien stated that they assessed the fines for the three trees that were cut below the previously cut level. They used the fact that the cuts that occurred were not the type that the PUD would have done

as well as the fact that the trees that the Megenitys cut were not on their property to assign the fines. They assigned a one thousand dollar fine for each tree, and each fine was tripled because the trees were in a right-of-way, thus a nine thousand dollar fine. It was not the maximum fine that was applied. They could have applied up to nine thousand dollars on each tree for a total twenty-seven thousand dollar fine.

Mr. Lien stated that, according to ECDC 18.45.07, the Megenitys were required to make corrective actions, to pick up the debris on the slope and to restore the site in public and private redress for their violation. The restoration included paying for any damage, replacing any lost ground coverage, and submitting a planting plan prepared by a certified arborist or a registered landscape architect to the City of Edmonds for approval in order to restore the screening on the property. The plan should include restoring species that are indigenous to the site, appropriate for the location under power lines, and were able to provide year round screening. Mr. Lien noted that Mr. Greenforest said there were not any species that fit this requirement, but in fact an excerpt from Tree Book: A tree selection guide for planting near power lines lists several indigenous trees that are appropriate to plant under power lines. The City is looking for a qualified professional to make the planting plan according to these specifications.

Mr. Lien stated that the planting plan ought to include a geotech report, and the planting plan should assess the viability of the trees that remain on the site. He stated that it was important they move forward on a planting plan as they are talking about a geologically hazardous site going into the rainy season, and he noted that both ECDC 18.45 and ECDC 18.23.40 include bonding requirements to assure that mitigation takes place.

Under cross-examination, Mr. Lien testified that the Exhibit 8, the City of Edmonds ROW Tree Cutting Procedures, is routinely handed out when people ask about trimming trees on private property. He stated that he does not remember when he first met the Megenitys but he would not have given them the hand out when he saw that they were not asking about cutting trees on private property. As soon as he saw that they were talking about cutting trees in a right-of-way, he would have referred them to engineering. He stated that he was aware that the City codes required a permit for tree trimming when he spoke with the Megenitys, but he was not aware what the various requirements for the permit were.

Mr. Lien stated that there is not a City arborist, but there is an arborist that the City consults, and he submitted an e-mail from May 24, 2012, Ex. 18, from the arborist with whom the City consulted, Dave Timbrook. Mr. Timbrook recommended against any replanting. Under questioning, Mr. Lien stated that he did not think that there were three arborists consulted about replanting the area because he did not believe that Mr. Kraus addressed whether or not to replant. He stated that the other two arborists, Mr. Greenforest and Mr. Timbrook, agreed that it was unnecessary to replant the area.

Mr. Lien stated that the concern over the cedar tree in particular was not alleviated when Mr. Greenforest said the topped trees would have several more healthy years, because cedar trees can live several hundred years. Mr. Lien stated that topping is never good for tree life. Under cross-

examination, he stated that he does not have any information about any damage that the topping the City did in 2005 might have done, and he does not have any information about any damage that the topping the Megenitys did in 2011 might have caused beyond the report from Mr. Greenforest about the trees having several years left.

Under cross-examination Mr. Lien stated that he was familiar with an e-mail from Ray Martin, which was submitted as Exhibit 19. Mr. Lien did not agree with the assessment that Mr. Martin made that the Megenitys did not do any damage to the tree roots because he has not investigated the picture that includes a tree stump. He stated that he takes the comments from the public into consideration, but comments that are not based upon the codes are not very helpful, because the Planning Department makes decisions based on the code. He stated that the e-mail from Karen Dwyer was received after the decision had been made, but it would not have been taken into consideration in making the decision because the e-mail did not reference the codes on which decisions are based.

Mr. Lien stated that several people from the City weighed in on assessing the codes, and that several people examine how egregious the violation was in assessing the fines. In this situation, they looked at the fact that the trees were not on the Megenitys' property. Among those who weighed in on assessing the fines, in addition to himself there was the Development Services director, the Public Works director, the Community Services director, and the Mayor. The fines considered were between five thousand and twenty-seven thousand dollars.

Under questioning from a witness, Mr. Lien clarified that the permit fees for after the fact permits can be increased up to five times over those submitted prior to development. The witness asked whether or not only the adjacent property owners could apply for a permit to trim the trees in a right-of-way, and Mr. Lien stated that others, including someone across the street, can apply for a permit to trim the trees, but the permit would not be granted.

The hearing examiner asked for clarification about the permit requirements as outlined in ECDC 18.60.100, and Mr. Lien stated that the City grants permits for alterations when trees pose a threat to safety, and a permit is required when this is the case. No alterations can be done in right-of-ways without a permit. The Public Works director stated that there are a few exceptions; for example, City crews are not required to get permits to maintain vegetation. Anyone can apply for a permit, but the Megenitys would not meet the criteria for acquiring approval. He stated that the codes list what alterations require a permit.

Mr. Lien stated that the tree cutting code does not really define cutting. Historically, the City considered topping trees to be cutting. This is why there are exceptions for Public Works to do maintenance in critical areas, and they took this into consideration when they assigned the fines. While the Megenitys would not have been granted the permit to do that topping, PUD may have done that topping. The type of cutting that the Megenitys did, however, was not the type of cutting that the PUD would have done. The fines also apply specifically to the three trees that were cut below the previous topping level, thus cut below any maintenance. He stated that they did not give the maximum fine, because the maximum fine is three thousand dollars, and they fined a thousand for

each tree rather than three thousand dollars for each. They took into consideration that the Megenitys consulted the City and their neighbors as well as that the Megenitys crossed the street. Also, the Megenitys have responded to everything the City asked for in a timely manner, which is another reason the City did not assign the maximum fine.

Mr. Lien clarified that the Megenitys have not submitted a planting plan, and the City want a geotech report to be included within the planting plan.

Under questioning from the Appellants' attorney, Mr. Lien stated that the reports from the arborists were not clear, but the arborist report that the Megenitys submitted does say that three trees were topped below the previous level. The arborist report said the three trees were approximately three inches in diameter, and the Appellants' attorney asked if the City determined whether or not the trees were three inches or, in fact, were less than three inches. Mr. Lien looked at photographs from Exhibit 15 and stated that the City identified the tree pictured as among the three trees topped, and the diameter is clearly greater than three inches. He did not measure it, but eyeballed it. He stated that they do not know for certain about the other two topped trees, but he assumes from the arborist report that they were greater than three inches.

Patricia Taraday, assistant Edmonds City Attorney, stated that the Greenforest arborist report in Exhibit 3 indicates that the other two trees were greater than tree inches in diameter, too.

Mr. Lien clarified that the notice of violation was for every tree that the Megenitys cut because they should have had a permit, but the fine was for the three trees that they cut below the previously topped level. Under questioning from the Appellants' attorney, Mr. Lien stated that there is not a minimum fine, but there is a maximum fine, and they did not assign the maximum fine to the Megenitys for several reasons explained earlier to the hearing examiner.

Karen Launceford testified that her family has lived in Edmonds for years and that they want the appeal to be denied and the area restored according to City code 18.45.075. She stated that the bottom line is that they wanted their adjacent right-of-way fixed. Before, they did not see a constant stream of headlights in their living room from Olympic View Drive, they did not hear the voices of joggers, they did not worry that criminals thought about breaking into their large home through its vulnerable back door, because you could not see it from the street. They did not worry about people seeing their teenagers dancing in the family room because they could not before the trees were topped. The dense vegetation used to protect against storm water, and they want that back. They want to be involved in the plans to replant the lost vegetation and to restore the area for screening and for storm water protection to the fullest extent possible.

Mrs. Launceford noted that PUD stated that their primary function is to maintain safe clearance for code, that at the Megenitys request PUD sent a certified arborist to the location on February 16, 2011, and, after the visit, the arborist concluded that no trees were in the power lines. The next month, however, the Megenitys proceeded with their illegal clearing by their own initiative. Additionally, PUD does not cut without written approval from the homeowner adjacent to the right-of-way unless

there is an emergency situation, a fact that is also included in the documents that PUD provided, and PUD uses qualified power line tree trimmer employers from the district and contractors who have gone through a pre-qualification process to trim vegetation, and that is also noted in the letter for PUD. Mrs. Launceford stated that neither Mr. Megenity nor his unqualified, uncertified tree cutting contractors had the credentials, training, permits, or legal rights to imply that their actions were based on PUD standards. Based on these facts, the Megenitys cannot justify that the cutting was allowed or compliant with PUD standards, and they cannot claim that the tree cutting was necessary, because the PUD assessment stated clearly that there was no conflict with the lines, which is why any litigation regarding an appeal should be disregarded.

Mrs. Launceford stated that the arborists said the trees were topped to their previous levels, but they did not explain how they knew this without having seen the trees before they were topped the second time. They did not present any evidence to explain how they knew that three trees were topped past the previous topping level but the rest were not, and neither arborist responded to letters from the Launcefords inquiring about this.

Mrs. Launceford submitted five photographs the Launcefords took of the site and an e-mail from Tod Moles to the Planning Department as Exhibit 20. Mrs. Launceford stated that the first photograph was taken in February 2010 and the second photograph was taken last week; a low-level re-growth branch on the cedar is marked with a red sharpie to make the comparison clear. The distance from the floor of their garage and to the top of their roof is approximately 24.9 feet, which equates to approximately one inch on the photographs. If that scale is applied to the height of the trees, it appears the trees towards the north have heights that are almost an inch above the roof, or 22 feet, while the trees towards the south have heights that are about three-quarters of an inch above the roof, or 18 feet. Those trees were topped below the roofline, and, as the arborist reports claim, those trees are now 12 feet tall, which includes any re-growth stimulated by topping. The actual height of the topping is below that to another few feet, which is why it can be reasonably assumed that the topping the Megenitys did resulted in a net reduction of the height of trees of nearly fifty percent, and there is no indication that these reflect levels of previous topping.

Mrs. Launceford stated that the Megenitys made many cuts to reduce the density of trees, as seen in the second set of photographs in Exhibit 20. She stated that cedar trees do not re-grow upward after topping, and the year before the Megenitys trimmed the trees the cedar tree was fully green at a height significantly taller height than where the dead branches reach today. She testified that the City staff sent to evaluate the cutting sent a memo to the Planning Department from Tod Moles that said that the trees were obviously cut for the sole purpose of sight enhancement. The large trees have been cut before, but there were several saplings that had no bearing on the power lines yet were cut as well. The responsible party had very little regard for the adjacent property owner, leaving gaping holes in the vegetation to gain access to the trees that they cut.

Mrs. Launceford stated that they have asked for clarity in how the arborists and the City came to the conclusion that these trees were topped to the previous level. Her family feels the evidence available refute any claim the Megenitys made regarding previous topping, and the burden of proof of these

statements have not been met by the Megenitys, any of the arborist reports, and the statements made by the City, and should be disregarded in mitigating the Megenitys action and their grounds for appeal.

Mrs. Launceford stated that the topping did irreparable damage to the trees, and she submitted a document, Ex. 21, provided by the international society of agriculture that certified the arborist that the Megenitys hired. The document clearly identities the damage that topping trees can cause; for example, topping puts stress on trees and triggers survival mechanisms in the trees that can kill the trees if they do not have enough energy. A stressed tree with large holes is also more subject to insect infestation and may lack sufficient energy to defend chemically against invasion, and the risk of limb failure in inclement weather increases. Also, the tree topping that was done was incredibly ugly, and it was expensive, too, because hidden costs from tree topping include increased maintenance costs, reduced property values, and increased liability potential.

Mrs. Launceford stated that the arborist reports observed new growth but the growth could be a reaction to the devastating cuts and cannot speak to whether or not the trees remain healthy overall. She questioned whether or not the arborist that the Megenitys hired is qualified as an expert in vegetation sound management, and he is not qualified to say their reaction to the sound management is psychological. Mrs. Launceford stated that her family expressed their concern over the cutting after the Megenitys first trimmed the trees in March, but the cutting continued despite their concerns. She looked at two photographs from Exhibit 20 to show, first, that there was, in fact, a tree stump, which would indicate that some trees were removed. She stated that they were unable to find this stump, and she believes the Megenitys may have had the stump and others removed prior to contacting an arborist. The second photograph showed the debris that proved the damage, and it does not accurately illustrate the true volume of the damage that occurred.

Mrs. Launceford stated to make the claim that the tree topping was routine maintenance, it is necessary to have the rights and responsibilities to perform routine maintenance, and those rights and responsibility fall to the adjacent property owners, to the Launcefords, not across the street to the Megenitys. Also, the severity of the cuts would not be considered routine maintenance by any industry standards or by PUD standards.

Mrs. Launceford stated that there has been harm to the critical area, and she submitted documents surrounding to the subject as Exhibit 22. Because they were on the adjacent property to this critical area, her family was required to submit a critical area report in 2007 when they remodeled their home. The report was required to meet not only the standard report requirements outlined in ECC 23.40.090 but also the general mitigation requirements outlined in ECC 23.40.140. The right-of-way is considered a landslide area, which meant they had to meet additional critical area report requirements for landslide hazard areas outlined in ECC 23.80.50, which triggered a requirement for a licensed engineer, and, because the area is considered an erosion hazard, too, they had to meet the additional criteria outlined in ECC 23.80.50-70. This cost them an additional thirty thousand dollars to their project for reports, testing, and storm water retention requirements. They met all of the requirements but never touched any of the vegetation in the area. There was significant damage to the vegetation

over the calendar year when Mr. Megenity continued to trespass, but not one report or one test has been required of the violators or been conducted by the City.

Mrs. Launceford stated that because of the complexity of issues in critical areas, including the geologically hazardous slopes, the harms that can be caused by loss of foliage to erosion hazards, and the need to understand storm water retention, her family does not understand how an arborist would consider himself qualified to claim that no harm has been caused to the site. Neither the arborist nor the violator has the knowledge or expertise to comment on the impact made to the critical area. Mr. Megenity was aware of the violations to critical areas when he first received his violation notice in February with the attachments that explained what his responsibilities were towards critical areas, and he should have reasonably understood that the harm needed to be evaluated by appropriate professionals to make any claims regarding the health of the area.

Mrs. Launceford noted that the claim the violators made that the trimming has promoted the healthy and the stability of the vegetation is not reliable. The ability for trees to absorb storm water and to prevent runoff is illustrated in photos taken from Google Earth. The photographs show that the canopy overhang from the area is over the property line onto their private property, which puts the overhang beyond any PUD trimming that would have occurred, and the photographs show that the overhang was greatly reduced from the trimming that the Megenitys did. Mr. Megenity continued to trim the area after this photograph was taken in September 2011, which means the overhang on their property was further reduced. Mrs. Launceford stated that because a qualified professional did not perform the assessment and damage to the illegal clearing of a critical area, any statements made on behalf of the violators should be disregarded in mitigating the Megenitys' actions and grounds for appeal.

Mrs. Launceford stated that it is impossible for her family to understand the violator's claims regarding their activity. Any reasonable citizen would know that they do not have any rights to cut on someone else's property across the street. Any reasonable citizen has access to the appropriate code and informational documents online and at City hall. Any reasonable citizen would expect to get written approval for the type of activity that the Megenitys undertook. Any reasonable citizen would be sure he hired an authorized contractor and obtained the related permits to close roads and to cut near the power lines.

Mrs. Launceford stated that the Megenitys claim that they received implied approval to do this work, yet they have not provided any written documentation from PUD or the City of Edmonds that substantiates their claims, and each of those entities says the claims are not true. Mrs. Launceford noted that her family never received the letters that Mr. Megenity said he sent to the Launcefords. She stated that the Megenitys disregarded public safety, the rights of other citizens, and the law. The trees were trimmed over sidewalks and streets with no regard for anyone, and people who lacked the appropriate credentials did the cutting within ten feet of electrical lines. Reasonable people would not have made the decisions that the Megenitys made to proceed with their actions. At no point, had the Megenitys informed the Launcefords of their intent to cut in the right-of-way adjacent to their property and over their property line.

Additionally, Mrs. Launceford stated that the Megenitys would not have been eligible to apply for a permit because they lacked the required position of owning the adjacent property. She stated that the claims the Megenitys made that they could not research it, could not get answers from the City, could not get responses to the letters they sent to the neighbors seems questionable. She stated that flyers about the City codes and requirements for a permit are hanging right up in the Planning Department lobby for anyone to access. She submitted these as Exhibit 23.

Mrs. Launceford stated that her family expects the replanting plan submitted by the Megenitys to meet the criteria in section 18.45 in the City code. The code says that the replanting out to promote public health, safety, and general welfare, to preserve the physical and the aesthetic character of the City through the prevention of indiscriminate removal of trees, to promote land development practices that result in a minimal adverse disturbance to existing vegetation and soil, to minimize surface water and ground water runoff and diversion, to aid in the stabilization of soil, to minimize erosion, and to maintain clusters of trees for the abatement of noise and for protection.

Mrs. Launceford stated that she and her husband were disappointed that higher fines were not imposed on the Megenitys, especially considering that the City recently raised the maximum fine to discourage violations like what the Megenitys did. She does not see anything in the codes that says any mitigation should have been made because the trees were topped before, and, in fact, most of the trees were not topped before.

Mrs. Launceford stated that the violators, according to the codes, should be responsible for the costs to restore the area, and tree removal is not the only damage for which they would be responsible. The Megenitys ought to have a professional arborist reassess the trees to determine the damage the topping did to their health with consideration to the fact that average lifespan of these trees is seventy-five to two hundred years. They ought to provide for the continued ongoing care of the trees, because, as evidenced in documents already provided, while trees might show additional growth in the first year after they are cut, they require more care in the long term to see that they survive. Additionally, they ought to provide for recovering to industry standards on the previously cut trees, which she said was especially important to them as far as aesthetics. In their planting plan, they ought to allow for the replanting of the damaged coverage. They ought to work to restore the sound barrier.

Mrs. Launceford stated that the violators did not provide accurate information about the harm to the right-of-way. Her family expects that the replanting plan will assure the best possible return to the safety of the landslide area as it applies prior to the cutting, which may include exuberant costs such as replanting to rapidly replace ground coverage lost from cutting, insuring slope stability through industry standard methods, and ensuring the long-term viability of this critical area through standard industry practices. She stated that her family believes the claim that the Megenitys cannot meet the City requirements for a replanting plan stems from the fact that the Megenitys did not hire the appropriate professionals. She stated that perhaps the Megenitys meant to say that they could not meet the City requirements for a replanting plan without spending a lot of money.

Mrs. Launceford stated that her family has been working on this since February, and they feel that they have been forced to bear the burden of proof in a situation in which someone crossed the street and cut trees under what they claimed were PUD standards but were not and when PUD said that there was no reason to cut those trees. Her family takes their rights and responsibilities toward the critical area adjacent to their property very seriously. They have always met code requirements, and in return they have enjoyed the benefits of privacy in their yard. It is stunning to her family that the violator accepts no responsibility for his illegal actions, but their trust in others and their assumption that others adhere to the law is among the reasons it took as long as it did for them to realize the violators were acting illegally in the first place. The first spring when they saw what had been done to the cedars, they assumed that PUD had done what it was allowed to do and had simply done a horrible job at it. It was not until they saw Mr. Megenity out the window in their right-of-way about three feet from their house that they started to realize there was a problem.

Ms. Launceford stated that she hoped the fact that the Megenitys have taken no responsibilities for their actions will be weighed in considering their case, and she invited the hearing examiner to come onto their property to see the damage that was done.

Under cross-examination from Mr. Cruz, Mrs. Launceford clarified that she received the first letter from the Megenitys that introduced them as neighbors in January 2011 and that the Megenitys did visit the Launcefords on their property as the Megenitys claim, but they recall that visit much differently than the Megenitys do. They told the Megenitys that they liked having the right-of-way to provide privacy for their family. That was the last contact her family had with the Megenitys. They did not receive any other letters from the Megenitys.

Mrs. Launceford stated that her family did not hire an arborist. She stated that when PUD trimmed the trees in 2005 they went to the Launcefords for written approval, and she does not have any pictures from 2005, but the trees that were cut were only those that would have grown into the power lines. The trees beside the power lines did not need to be cut and were not cut in 2005, but the Megenitys trimmed several.

Mrs. Launceford disagreed with Mr. Cruz and stated that when the trees lose their leaves in the winter that does not make the house visible from the street.

Ms. Donna Breske (Edmonds, WA) testified that she is a property owner in Edmonds, a mother, and a wife as well as a professionally licensed engineer with a degree in civil engineering from the University of Washington and a background in geology. She noted she was not testifying as an expert witness. She stated that the City failed to provide appropriate evidence that the right-of-way was a critical area. She noted that the computer program used to determine that the slope was forty-seven percent is not reliable and that the City should have had the slope surveyed to determine the actual slope. She stated that ECDC 23.80.020.8.1 speaks specifically to the soil types that designate a critical area, in this case a geologically hazardous area. There should have been a site test to find out exactly what the soils were, because the soils on top are probably different than those that underlie the area when the roads were built, which is why relying on the USGS soil survey would not be adequate.

Ms. Breske stated that, according to the City code, a critical slope needs to run for twenty-five feet to be determined, which the City did not do with their forty-seven percent figure. The City staff failed to provide proper evidence to conclude that this was a critical area. Mr. Lien did not follow generally accepted survey standards, and it is unclear where the property line is, because the fence does not necessarily indicate it. She stated that staff has jumped to imposing a code enforcement on law-abiding citizens without first harmonizing the sections of the code having to do with fact-based evidence. The trees might in fact be on private property and not on the right-of-way, and that ought to be properly determined. Ms. Breske questioned why, if Mr. Lien is only responsible for tree cutting on private property, he is testifying about tree cutting presumably in a right-of-way.

Mr. Ryan Megenity, the son of the appellant, testified that his father and Carol Megenity have volunteered in the community since they moved to Edmonds two years ago, and they are responsible citizens invested in the community and ought to be treated as such.

Kernen Lien responded to Ms. Breske's comments. He noted that the soil in an area is how the City determines whether or not an area is an erosion hazard and is not applicable to whether or not an area is a landslide hazard. He stated that a slope was determined over ten feet of distance rather than twenty-five feet of distance as Ms. Breske claimed. There was a critical area determination done on the Launcefords' property when they did an addition on their house.

Under questioning from Mr. Cruz, Mr. Megenity testified that he did, in fact, mail all three letters to the Launcefords that he claimed he did. Under questioning from the hearing examiner, Mr. Megenity stated that the cases for code-enforced fines imposed for similar circumstances that he mentioned earlier in his testimony referred to Ferran, Sperbeck, and Berlinbach.

Exhibits

The nine exhibits identified at page 7 of the August 3, 2012 were admitted into the record during the hearing. The following exhibits were also admitted during the hearing:

Exhibit 10: August 3, 2012 staff report
Exhibit 11: photographs of the site taken by the Megenitys
Exhibit 12: Notice of Appearance of Timothy Farley
Exhibit 13: Dan Kraus arborist report
Exhibit 14: 8/9/12 email from Karen Dwyer; 9/5/12 email from Susan Emmons; 8/10/12 email from Chrystal Lanning
Exhibit 15: 23 color photographs of the site taken by the City
Exhibit 16: Three aerial pictures of the sites, including one infrared
Exhibit 17: 9/10/12 PUD information packet on necessity of topping/cutting trees at site
Exhibit 18: 5/24/12 e-mail from City arborist Dave Timbrook
Exhibit 19: 7/15/12 e-mail from Ray Martin

Exhibit 20: 5 photographs of the site taken by the Launcefords and a 4/9/12 e-mail from Tod Moles
Exhibit 21: document entitled "why topping hurts trees" and five photographs of trees
Exhibit 22: "critical areas reconnaissance report"; 2/22/12 letter from Mike Thies to Megenity; two aerial photographs
Exhibit 23: Two City informational flyers on tree cutting; 12/9/02 flyer on procedures for removing trees in City right of way.
Exhibit 24: Notices of Violation for Ferran, Birlenbach and Sperbeck.

Findings of Fact

Procedural:

1. Appellant. The Appellants are Richard and Carol Megenity.

2. Hearing. The Examiner held a hearing on the appeals at 3:00 pm on September 12, 2012, in the City of Edmonds City Council Chambers. The hearing was left open through September 17, 2012 in order to provide staff with an opportunity to submit copies of notices of violation for other tree cutting cases.

Substantive:

3. Description of Appeal. The Appellants appeal the issuance of a Notice of Violation and Monetary Fine, Ex. 1 ("NOV"). The NOV imposes a $9,000 fine for the topping of three trees located across the street from the residence of the Appellants in the late winter of 2011. Although not identified in the NOV, at hearing staff testified that the fines were based upon the understanding that each of the three threes had a diameter of three inches or more. The Appellants hired a tree cutting company, Eco Tree Service, to top several trees in order to improve their water view of Puget Sound, from their residence located across Olympic View Drive to the west. Eco Tree Service cut the trees in an 85' x 20' area adjoining the west side of Olympic View Drive, across the street from the Appellants' residence. An arborist hired by the Appellants, Daniel Kraus, Ex. 2, concluded in his assessment of the cutting that most of the trees were topped to levels previously topped by Snohomish County PUD in order to avoid interference with overhanging power lines. The three trees that serve as the basis of the $9,000 fine were those identified in the Kraus report as cut below the prior levels cut by PUD, each having a diameter of "approximately" three inches. City staff subjected each tree to a $1,000 base fine under ECDC 18.5.070(D) and then tripled that amount to $3,000 for each tree because of their location in a landslide hazard area as required by City code. The NOV also required the Appellants to clear the debris left behind from the topping of the trees and to restore removed vegetation by preparation and implementation of a replanting plan prepared by a certified arborist.

In their appeal the Appellants requested that the fines be dismissed or reduced because prior to topping the trees they had consulted with the planning department, affected neighbors and

Snohomish County PUD. The Appellants claimed that the planning department had adopted a "don't ask, don't tell" position on their proposal to cut down the trees and that they were referred to the Edmonds Public Works Department, who in turn referred them to Snohomish County PUD. Snohomish County PUD advised them that they would not be topping the trees again until 2012 so the Appellants went ahead and did the topping themselves in 2011 to maintain their views for the summer of 2011.

4. Property Description. The Appellant's residence is located at 18715 Olympic View Drive, Edmonds, WA. The tree cutting at issue took place across from the Appellants' residence along the western side of Olympic View Drive.

5. Megenity Coordination with City and Neighbors:

A. Neighbor Contacts. Prior to topping any trees, the Appellants made several efforts to consult with affected parties. They sent letters to two home owners abutting the tree topping area advising that they planned to top the trees. The rear of the two homes abutted the tree area, such that the trees in question served as a buffer between the rear yards of the homes and Olympic View Drive to the east. Karen and John Launceford were one of the two home owners. They assert that they sent three letters to the Launcefords on January 7, 2011, February 21, 2011 and March 15, 2011. The Launcefords deny receiving the last two letters. The first letter asked if the Launcefords would consider allowing the Appellants to cut the trees to improve the Appellants' view. The Appellants met with Karen Launceford on February 7, 2011 to discuss the contemplated tree topping. Mrs. Launceford advised she would need to consult with her husband. The second letter acknowledged meeting with Karen Launceford and identified consultations with Snohomish County PUD and the consideration of using Asplundh Tree Company to top the trees. The third letter noted that Snohomish County PUD would not be topping the trees until 2012 and that the Appellants were planning to "firm something up" with Eco Tree Service to top the trees "this month".

The Murrays owned the second home abutting the tree topping area. In response to the Appellants' letter advising of their tree topping plans, Mr. Megenity met with the Murrays and they referred him to the Snohomish County PUD.

B. City Contact. On January 7, 2011 the Appellants met with City of Edmonds Associate Planner Kernen Lien to discuss topping the trees. Mr. Lien directed the Appellants to the Edmonds Public Works department. The Appellants then went to discuss the tree topping with Tod Moles in the Public Works Department, who told them to talk to Snohomish County PUD, since the PUD takes care of tree maintenance below its power lines. Mr. Moles and Mr. Lien did not identify any requirement to get a permit to top the trees.

C. PUD Contact. The Appellants left voicemail messages with Snohomish County PUD on January 7, 2011, February 13, 2011 and February 21, 2011. "Katie" returned their calls

on February 23, 2011 and told them that the PUD had not topped the trees since 2005 and the PUD had no plans to trim the trees in 2011.

6. Tree Cutting. The Appellants hired Eco Tree Service to top the trees. Eco Tree Service cut the southern portion of the vegetation on March 29, 2011 and the northern portion of the vegetation on May 11, 2011. Eco Tree Service knocked on the door of the Launceford home immediately before each tree topping session and received no response.

7. Launceford Complaint. The Launcefords filed a written complaint with the City of Edmonds regarding the tree topping sometime in January, 2012. The Launcefords asserted that the tree topping significantly reduced the sight and sound protection provided by the trees. They asserted that as a result of the tree cutting they can now hear people walking along Sound View Place, that these people can now look into their back family room, and that headlights from Sound View Drive vehicles now shine into their back family room. The Appellants' arborist, Favero Greenfield, disputes these assertions in his arborist report, Ex. 3, but his observations on loss of sound buffering are questionable given his lack of credentials in this area. Susan Emmons, a nearby resident on Olympic View Drive, wrote in Ex. 14 that "*from the street where the cutting occurred there was no noticeable difference as the trees are still much higher than one can see over*". Given the extensive topping depicted in the photographs of the record, it is determined that the tree cutting did create at least some interim damage to the Launcefords by reducing privacy and screening.

8. Right of Way. The subject tree cutting occurred within City right of way.

At hearing Donna Breske asserted there was insufficient evidence on whether the tree cutting had occurred within City right of way. Second to the diameter of the trees subject to the NOV, the location of the right of way is the most tenuous[1] part of the City's case. There is no documentation that directly supports the location of the right of way nor is there any explanation on how the City determined the right of way location for purposes of the NOV. However, the Appellants' own arborist, Daniel Kraus, in his March 5, 2012 report concluded that "*records indicate the inspected area [area subject to cutting] is a portion of the City right of way*". In an April 9, 2012 email from Tod Moles, an employee of the City's Public Works Department, Mr. Moles concluded that "*public works has determined there has been some illegal cutting in the City's right of way for view enhancement.*" Kernen Lien, City planner, concluded that the cutting area was in public right of way when he referred the Appellants to the public works department upon the Appellants' first

[1] Given that this is a civil proceeding and the "beyond a reasonable doubt" and "clear and convincing" evidentiary standards do not apply, a professional survey would typically not be necessary as asserted by Ms. Breske when the location of right of way is uncontested. However, the City should provide some evidence that specifically shows how the location in question was determined to be right of way. Plat maps or deeds showing the width of right of way compared to measurements of the width of the paved portion of the road, along with evidence on where the paved portion is situated within right of way, would be very helpful. Ultimately, whether or not the trees were located in right of way is not significant in this decision since the fines imposed were not based upon the right of way permit requirements as discussed in the Conclusions of Law.

contact with him. The numerous photographs of the cutting site, the vicinity map, Ex. 4, and the arborist reports all show the cutting adjacent to and within 20 feet of the paved portion of Olympic View Drive. Exhibit 5 also identifies a fence placed by the Launcefords along the western side of the right of way, which the Launcefords would presumably place along their property line. Significantly, the Appellants did not contest the conclusion that the subject trees were located in the right of way and there is no evidence in the record that reasonably suggests a different conclusion. Given all of these factors, it is determined that more likely than not the subject trees are located in City right of way and also that there is substantial evidence given the entire record to support this determination.

9. Landslide Hazard Area[2]. The subject tree cutting occurred within a landslide hazard area as designated by ECDC 23.80.020(B)(2) or within the buffer to the landslide hazard area as designated by ECDC 23.80.070(1).

Donna Breske asserted at hearing that the City did not have sufficient evidence to support its determination that the subject cutting was done within a landslide hazard area as designated in Chapter 23.80 ECDC. Ray Martin in Ex. 19 also challenged this determination, noting that the slope is more like 20-25 degrees as opposed to 47 degrees as asserted by the City, because overlaying soils were pushed to the west when Olympic View Drive was constructed. However, the staff report's conclusion that the slope is 47 degrees is based upon LiDAR imaging. A critical areas reconnaissance report prepared on July 11, 2007, Ex. 22, concluded that the "*site may contain or be adjacent to critical areas, including Landslide Hazard and Erosion Areas*". The numerous photographs of the project show that the only steep slopes on the property are within the tree cutting area. During the hearing Mrs. Launceford noted that she was required to spend $30,000 on engineering studies for some work on her home because the area within the subject tree cutting area qualified as a landslide and erosion hazard area. The Appellant did not contest the designation of a landslide hazard area. Given the staff's site specific findings, Mrs. Launceford's own engineering work, the photographs of the site and the absence of any significant contrary evidence, it is determined that more likely than not the three trees subject to the NOV were located in a landslide hazard area (or its buffer as determined below) and also that there is substantial evidence given the entire record to support this determination.

The fact that some of the soils composing the slope may have come from Olympic View Drive construction does not appear to be of any relevance, since the designation criteria used by staff, ECDC 23.80.020(B)(2), are not dependent upon the origin or type of soils that comprise a slope. Further, a slope does not need to run for 25 feet as argued by Ms. Breske to qualify as a landslide hazard area, as ECDC 23.80.020(B)(2) requires a slope to run at least 25 feet **or** rise at least ten feet. Staff testified that the slope had a rise of at least ten feet.

[2] This is of necessity a mixed Finding of Fact and Conclusion of Law, because prior conclusions that the area qualifies as a landslide hazard area under City code support the factual determination that the slopes are 47 degrees or at least exceed the threshold for qualifying as a steep slope.

It is possible that one or more of the trees subject to the NOV are located on the top[3] of the slope comprising the landslide hazard area as opposed to the hazard area itself. As identified in ECDC 23.80.020(B)(2), the top of the slope is used to delineate the hazard area, which implies that the top is not part of the hazard area. The City's arborist, in Ex. 18, states that "*the top of the slope only has about 6 feet of flat area before dropping off quite rapidly.*" The arborist notes that replanting isn't feasible in this area, suggesting that some of the tree cutting may have occurred in this area. The photographs, such as those in Ex. 15, show that this flat area immediately adjoins Olympic View Drive. ECDC 23.80.070(A)(1) provides that the buffer to landslide hazard areas shall apply to the edges of a landslide hazard area and shall be equal to the height of the slope or 50 feet, whichever is greater. The six foot area identified by the City's arborist is located entirely within this buffer.

10. Tree Diameter. One of the three trees subject to the NOV has a diameter of three inches or greater. There is insufficient evidence to establish that the other two trees have diameters of three inches or greater.

At hearing, Mr. Lien testified that he concluded that all three trees subject to the NOV had a diameter of three inches or greater based upon the findings in the arborist reports prepared by the Appellants. The only reference to tree diameter is in the March 15, 2012 Kraus report, which concludes that "*the diameter of the cuts [for the trees subject to the NOV] being approximately 3*"". Mr. Kraus' conclusions of an approximate diameter certainly leave open the reasonable possibility that some or all of the trees could have a diameter less than 3". His conclusions are not sufficient to support a finding that the trees subject to the NOV are 3" or more in diameter.

It is acknowledged that it is unlikely that a tree of less than a three inch diameter would have been tall enough to incur the blades of the Eco Tree Service. However, there was no evidence or argument presented on this point and to make such a conclusion without any additional information is pure conjecture. Further, the City put itself at great disadvantage in assessing a $9,000 tree cutting fine without specifically identifying what trees were cut. The trees subject to the fine should have been identified by photographs and measured to ensure that they in fact had a diameter of three inches or greater. The City has essentially attempted to prosecute a murder without a body. Any felony prosecutor will tell you such a stunt is fraught with peril.

At hearing Mr. Lien identified a tree in the first photograph of Ex. 15 that he noted was one of the three trees identified in the Kraus report as cut below prior PUD cutting levels. The Kraus report noted only three trees were cut below prior PUD trimming levels. It is these trees that are the

[3] It is very unlikely that any trees would be located in the toe of the slope. Page 1 of the Greenforest report notes that the right of way slopes from the "street" all the way down to the Launceford residence and that this slope encompasses the entire 20 foot wide cutting area. This observation apparently overlooks the six foot top of the slope, or it's possible that no cutting occurred within the top, which is a possibility acknowledged in Finding of Fact No. 9. At any rate, even if cutting did occur in the toe of the slope, it would have been within the buffer to the toe, which would have to be at least fifty feet, which by itself exceeds the width of the 20 foot wide cutting area identified in the Greenforest report.

subject of the NOV. The tree identified by staff in Ex. 15 clearly has to be one of those three trees given that it is cut several feet below the overhanging power lines. Further, the tree identified by staff is also clearly more than three inches in diameter. Given these factors, the tree identified by staff in Ex. 15 has a diameter greater than three inches and is one of the trees subject to the NOV.

11. Normal PUD Maintenance. The City and Mrs. Launceford submitted a substantial amount of evidence on whether the tree cutting by the Appellants exceeded the cutting necessary to avoid interference with overhanging power lines. As it applies to trees not subject to the NOV, this evidence was irrelevant. The Kraus conclusion that the three trees subject to the NOV were cut lower than past PUD trimming is uncontested and supports a finding that the trees were cut more than was necessary for PUD maintenance work. The fact that other trees were cut more than necessary is not relevant to this NOV appeal, because this NOV appeal is limited to assessing the validity of the City's findings and conclusions as they relate to the three trees subject to the NOV. Staff did not refer to the cutting of the other trees as a factor in its assessment of fines for the subject trees, nor would such a consideration have been appropriate given the other tree cutting would constitute separate violations. Ex. 17 and the other evidence regarding normal PUD maintenance work is only relevant to the extent it addresses whether the cutting of the three NOV trees exceed PUD maintenance. The evidence clearly establishes that the three NOV trees were cut more than is necessary for PUD power line maintenance work.

12. Replanting. Replanting is not necessary, practically feasible or safe to remedy the impacts of the Appellants' unauthorized tree cutting.

The Applicants' arborist, Favero Greenforest, concluded in his July 18, 2012 report, Ex. 3, p. 5, that "*there is very limited space within the ROW for replacement plants, and any new plantings may not thrive given the density of the existing vegetation.*" The arborist further concluded at p. 4 of his report that no plants could meet the species requirements of the NOA. Rather than dispute these conclusions, the City's arborist, Dave Timbrook, recommended in Ex. 18 against any replanting along the top of the slope due to the limited space available and a threat of erosion. The only evidence the City has to support its requirement for a replanting plan is a reference to a book that lists species that can be planted under power lines. This book reference is not sufficient to overcome the site specific analysis conducted by the Appellants' arborist, which in turn is supported by the City's own arborist.

At hearing Mr. Lien noted that one of the functions of the replanting plan would be to address and remedy any slope instability created by the Appellants' tree cutting. This logically should be an issue of concern when the vegetation on a landslide hazard area is disturbed. Mr. Greenforest concluded at p. 3 of his July 18, 2012 report that "*the topping has had no impact on increased soil erosion, and no negative effect on the stability of the slope.*" The qualifications of Mr. Greenforest, an arborist, to evaluate slope stability are dubious. However, the NOV specifically required an arborist to prepare the replanting plan. The NOV made no mention of a slope stability analysis or that any evaluation be made by a geotechnical engineer or other person qualified to assess slope stability. Further, the City's own arborist, in Ex. 18, recommended against replanting because this activity could actually

increase erosion.

The Appeal to the subject NOV as to the replanting plan is limited to determining whether a replanting plan by an arborist (as specifically required in the NOV) is necessary to mitigate the damage created by the Appellants' tree cutting. Since the NOV does not impose any requirement for assessing slope stability or require the expertise of someone qualified to assess slope stability, a qualified analysis of slope stability is beyond the scope of this appeal. Further, to the extent that the NOV impliedly required an arborist to assess slope stability, the conclusions of both the Appellants' and City's arborist are both that replanting is not necessary or even desirable for slope stability.

13. Deliberate ignorance. There is a great degree of discretion in assessing tree cutting fines. A critical factor in any imposition of fines is whether the violators knew their actions violated City regulations. At best, in this case the Appellants' engaged in what the federal courts call "deliberate ignorance" of the City's tree cutting requirements, i.e. awareness of a high probability of a violation and deliberate avoidance of the truth. *See, U.S. v. Karapetyan*, 468 Fed. Appx. 698 (2012).

The Appellants in this case certainly made an effort to work with the City and adjoining property owners to cut the trees of the NOV. However, they never asked permission from the City to cut the trees or asked whether City regulations would authorize them to cut the trees. This should be an obvious question for anyone seeking to cut trees on City property that doesn't even adjoin their own property.

The actions of the Appellants are all the more suspect by their conclusion that the City adopted a "don't ask, don't tell" approach to the proposed tree cutting. In both of the Appellants' appeal statements, Ex. 2 and 3, these words were used to describe the impression left with the Appellants after they first met with Mr. Lien on January 7, 2011. At hearing the Examiner asked Mr. Megenity what he meant by this language, as the Examiner mentioned it could be interpreted as "it's ok so long as you don't get caught". Mr. Megenity then clarified, through questioning from his attorney, that he only came to the "don't ask, don't tell" conclusion after Mr. Lien advised him that the planning department would have to take some code enforcement action because of complaints from the Launcefords. Those complaints did not come in until January, 2012, after the Appellants had cut the trees, well after the first meeting the Appellants had with Mr. Lien. The two written appeals are in direct conflict with the remedial testimony offered by Mr. Megenity during the hearing. The "don't ask, don't tell" understanding of the Megenitys strongly corroborates the conclusion that at best they acted in deliberate ignorance of City requirements pertaining to tree cutting.

Conclusions of Law

Procedural:

1. Authority of Hearing Examiner. ECDC 20.110.040(C) and (D) require the Hearings Examiner to conduct a hearing and issue a final decision, appealable to superior court, on appeals of NOVs.

2. Burden of Proof. Chapter 20.110 ECDC does not identify the burden of proof that applies to appeals of NOVs. The burden of proof that typically applies to a code enforcement action is the civil "preponderance of evidence" standard, where courts determine if "more likely than not" an asserted fact is true, *see, e.g., In re Crace,* 174 Wn.2d 835, 840 (2012). However, as acknowledged in ECDC 20.110.040(D), land use code enforcement actions are governed by Chapter 36.70C RCW. RCW 36.70C.130(1)(c) does not expressly adopt the "preponderance of evidence" standard for judicial review of land use decisions, but rather requires a challenging party to establish that "*the land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court*" . The factual determinations made in this decision are based both upon the preponderance of evidence standard and the substantial evidence standard.

3. Applicable Code Sections. Code sections cited in the NOV as the basis of the NOV fines and penalties are quoted below and applied through corresponding conclusions of law.

ECDC 23.80.040 Allowed activities – Geologically hazardous areas: *The following activities are allowed in geologically hazardous areas as consistent with ECDC 23.40.220, Allowed activities, Chapter 19.10 ECDC, Building Permits – Earth Subsidence and Landslide Hazard Areas, and Chapter 18.30 ECDC, Storm Water Management, and do not require submission of a critical area report:*

A. Erosion and Landslide Hazard Areas. Except as otherwise provided for in this title, only those activities approved and permitted consistent with an approved critical areas report in accordance with this title shall be allowed in erosion or landslide hazard areas.

ECDC 23.40.220(C): *Allowed Activities. The following activities are allowed:*

1. Permit Requests Subsequent to Previous Critical Areas Review. Development permits and approvals that involve both discretionary land use approvals (such as subdivisions, rezones, or conditional use permits) and construction approvals (such as building permits) if all of the following conditions have been met: ...

2. Modification to Structures Existing Outside of Critical Areas and/or Buffers. ...

3. Permitted Alteration to Structures Existing Within Critical Areas and/or Buffers...;

4. Activities Within the Improved Right-of-Way....

5. Minor Utility Projects...

6. Public and Private Pedestrian Trails. ..

7. Select Vegetation Removal Activities. The following vegetation removal activities:

a. The removal of the following vegetation with hand labor and light equipment:

i. Invasive and noxious weeds;

ii. English ivy (Hedera helix);

iii. Himalayan blackberry (Rubus discolor, R. procerus);

iv. Evergreen blackberry (Rubus laciniatus);

v. Scot's broom (Cytisus scoparius); and

vi. Hedge and field bindweed (Convolvulus sepium and C. arvensis);

b. The removal of trees from critical areas and buffers that are hazardous, posing a threat to public safety, or posing an imminent risk of damage to private property; provided, that:

i. The applicant submits a report from an ISA- or ASCA-certified arborist or registered landscape architect that documents the hazard and provides a replanting schedule for the replacement trees;

ii. Tree cutting shall be limited to pruning and crown thinning, unless otherwise justified by a qualified professional. Where pruning or crown thinning is not sufficient to address the hazard, trees should be removed or converted to wildlife snags;

iii. All vegetation cut (tree stems, branches, etc.) shall be left within the critical area or buffer unless removal is warranted due to the potential for disease or pest transmittal to other healthy vegetation or unless removal is warranted to improve slope stability;

iv. The land owner shall replace any trees that are removed with new trees at a ratio of two replacement trees for each tree removed (two to one) within one year in accordance with an approved restoration plan. Replacement trees may be planted at a different, nearby location if it can be determined that planting in the same location would create a new hazard or potentially damage the critical area. Replacement trees shall be species that are native and indigenous to the site and a minimum of one inch in diameter at breast height (dbh) for deciduous trees and a minimum of six feet in height for evergreen trees as measured from the top of the root ball;

v. If a tree to be removed provides critical habitat, such as an eagle perch, a qualified wildlife biologist shall be consulted to determine timing and methods of removal that will minimize impacts; and

vi. Hazard trees determined to pose an imminent threat or danger to public health or safety, to public or private property, or of serious environmental degradation may be removed or pruned by the land owner prior to receiving written approval from the City; provided, that within 14 days following such action, the land owner shall submit a restoration plan that demonstrates compliance with the provisions of this title;

c. Measures to control a fire or halt the spread of disease or damaging insects consistent with the State Forest Practices Act, Chapter 76.09 RCW; provided, that the removed vegetation shall be replaced in kind or with similar native species within one year in accordance with an approved restoration plan; ....

4. Unauthorized Work in Critical Areas. The trees subject to the NOV were cut in violation of the City's landslide hazard regulations, Chapter 23.80 ECDC.

ECDC 23.80.040(A) clearly prohibits any development activity within a landslide hazard area unless expressly allowed by the City's critical area regulations. There is no such blanket prohibition for activities within the buffers to landslide hazard areas, but this is necessarily implied given the detail in the regulations devoted to what activities are allowed in buffers and the absence of any alternative remedy for altering buffers when not expressly authorized. The only provision that remotely authorizes the Appellants' tree cutting in a landslide hazard area or its buffer is ECDC 23.40.220(C)(7)(b), which authorizes the removal of hazardous trees. As determined in Finding of Fact No. 11, the trees subject to the NOV were cut more than necessary to prevent them from interfering with overhead power lines. There is no other evidence in the record to suggest the trees subject to the NOV were hazardous for any reason. The tree cutting was not authorized by any City regulation and, consequently, was done in violation of Chapter 23.80 ECDC.

ECDC 18.60.000 Permits required: *No person shall enter the City right-of-way for the purpose of excavation, construction, maintenance or repair without first obtaining a permit from the development services director or City engineer. City rights-of-way include all easements, licenses or other rights of entry owned by the City.*

4. Not Addressed. City regulations are unclear whether the Appellants' tree cutting constitutes a violation of Chapter 18.60 ECDC, which governs the permitting system for "excavation, construction, maintenance, or repair" within City right of way. Given that the Appellants' tree cutting clearly violates the City's critical area regulations, it is unnecessary to determine at this time whether that tree cutting also violated Chapter 18.60 ECDC.

It is questionable whether the Appellants' cutting, for view purposes, constitutes "excavation, construction, maintenance, or repair". If the tree cutting does qualify as one or more of these activities, then the Appellants are in clear violation of Chapter 18.60 ECDC because the Appellants did not apply for an acquire a right of way use permit. If the Appellants' tree cutting doesn't qualify as one of these activities, it is very unclear whether they have violated Chapter 18.60 ECDC. Like development within critical area buffers for geologically hazardous areas, there is no blanket prohibition against development activities within City right of way beyond the permitting requirements for "excavation, construction, maintenance, or repair". Unlike geologically hazard area buffers, there are several remedies available to the City if unauthorized activities are conducted within City right of way. If the City actually owns the right of way in fee simple, the City owns the trees and the Appellants' tree cutting would trigger a variety of civil and potentially even criminal penalties due to the unauthorized destruction of City property. If the City's right of way is only an easement as opposed to a fee interest, as is the case in the vast majority of jurisdictions, then the Launcefords may own the trees and civil and potentially criminal remedies would be available for the Appellants' destruction of their property. Given the availability of alternative remedies, it is not necessary to imply a blanket prohibition against tree cutting within City right of way in Chapter 18.60 ECDC. Chapter 18.60 ECDC may very well be limited to governing "excavation, construction, maintenance, or repair" as its purpose clause expressly states. Due to all of these ambiguities in the applicability of Chapter 18.60 ECDC, the Examiner will decline to address the issue since the penalties imposed by the NOV are equally well supported by the critical area regulation violations.

ECDC 23.40.240(E): *Penalties. Any person, party, firm, corporation, or other legal entity convicted of violating any of the provisions of this title shall be guilty of a misdemeanor and subject to penalties set forth in ECDC 18.45.070 and 18.45.075. Each day or portion of a day during which a violation of this title is committed or continued shall constitute a separate offense. Any development carried out contrary to the provisions of this title shall constitute a public nuisance and may be enjoined as provided by the statutes of the state of Washington. The City of Edmonds may levy civil penalties against any person, party, firm, corporation, or other legal entity for violation of any of the provisions of this title. The civil penalty shall be assessed as proscribed in ECDC 18.45.070 and 18.45.075.*

ECDC 18.45.070: *B. Any person found to be in violation of the provisions of this chapter shall be subject to a civil penalty in an amount not to exceed $1,000 penalty for a tree of up to three inches and $3,000 for a tree three inches or more. This civil penalty may be in addition to any criminal, civil, or injunctive remedy available to the City. The planning division manager shall utilize the procedures outlined in Chapter 20.110 ECDC in order to notify an individual of violation; provided, however, that the same shall commence with a notice of civil violation as provided in ECDC 20.110.040(B) and be subject to an appeal as provided in ECDC 20.110.040(C).*

C. The fines established in subsection (B) of this section shall be tripled for clearing which occurs within any critical area or critical area buffer, in any earth subsidence or landslide hazard area, any native growth protection easement, in any area which is designated for transfer or dedication to

public use upon final approval of a subdivision, planned residential development or other development permit or for clearing which occurs on any portion of public property or within any portion of the public right-of-way.

5. As testified by staff, the City's penalties were based upon a determination that all three trees subject to the NOV all had a diameter of three inches or more. As determined in Finding of Fact No. 10, the evidence only supports a finding that one of the trees has a diameter of three inches or more. For this reason the base fine for two of the trees is a maximum of $1,000 under ECDC 18.45.070(A) instead of $3,000. The City imposed one third of the maximum $3,000 base fine for each of the trees. Given the finding of deliberate ignorance in Finding of Fact No. 13 and the fact that the Appellants' cut the trees on City right of way that wasn't even adjacent to their property, an imposition of two thirds of the maximum $1,000 fine is appropriate for a base fine of $667.00 for each of the two trees with diameters not proven to meet or exceed three inches. This amount is not the maximum $1,000 because of the efforts of the Appellants to work with the City and their neighbors. Another important consideration in the amount of the fine was the damage done to the Launcefords. The staff imposition of a $1,000 fine for the remaining tree will be sustained. The total base fine for all three trees is $2,334.00. As determined in Finding of Fact No. 9, the three trees are located within a critical area or its buffer. ECDC 18.45.070(C) requires the tripling of the base fine under these circumstances. The total fine is $7,000.

The fine is generally in line with prior cases referenced by the Appellants. In the Sperbeck decision, the Notice of Violation assessed a fine of $7,500, imposing the maximum fine at the time of $1,500 per tree for five trees. As in this case, the trees cut were on someone else's property. In the Ferran decision, the Notice of Violation imposed a fine of $900 for the removal of two trees from the owners own property. The maximum fine that could have applied was $18,000 for those two trees. In the Birlenbach decision the Notice of Violation imposed a fine of $500 per tree for the cutting of 25 trees on the owner's[4] property for a total fine of $12,500. The maximum fine could have been $1,500 per tree. On appeal the Examiner reduced the fine to $3,000, because it was established at hearing that the illegal cutting had been done by the tree cutting company hired by the Appellant without her knowledge or direction and that Appellant had acquired the necessary authorizations from the City prior to the cutting and had directed the tree cutting company to only cut to the extent authorized by the City. All three cases summarized above involved tree cutting in critical areas. The Birlenbach case was the only case appealed.

The most directly applicable case is Sperbeck, which involved cutting on someone else's property. The maximum fines imposed in Sperbeck are consistent with those imposed in this case, as the 1/3 reduction for two of the trees in this case fairly reflects the efforts of the Appellants to initially work with the City and their neighbors. Birlenbach is distinguishable because of the Appellant's lack of knowledge of what her tree cutting company did and her efforts to acquire City authorization and to comply with that authorization. Ferran is more difficult to reconcile with this case and with Sperbeck and Ferran. Given the Council's amendments to increase tree cutting penalties, the legislative intent

[4] The property in question was the estate of the violator's mother.

is clearly to strictly enforce penalties. The fines imposed in this case incorporate that legislative intent while also providing some recognition of the Appellants' efforts to work with the City and their neighbors.

ECDC 18.45.075(A): *A. Any person who violates any provision of this chapter or of a permit issued pursuant hereto shall be liable for all damages to public or private property arising from such violation, including the cost of restoring the affected area to its original condition prior to such violation and the payment of any levied fine.*
1. Restoration shall include the replacement of all ground cover with a species similar to those which were removed or other approved species such that the biological and habitat values will be substantially replaced; and

6. As determined in Finding of Fact No. 12, it is not possible or necessary to restore the property to its prior state to restore biological or habitat values and the City's own arborist has even recommended against restoration because it could cause erosion. The restoration requirements of the NOV will be removed.

DECISION

The Notice of Violation, Ex. 1, is modified as follows:

1. The total fine is reduced from $9,000.00 to $7,000.00.
2. No planting plan or restoration work is required beyond clearing debris.
3. Any remaining debris, as determined by staff, shall be removed by October 3, 2012.
4. Full payment of the monetary penalty shall be submitted no later than October 17, 2012.

DATED this 18th day of September, 2012.

Phil A. Olbrechts
City of Edmonds Hearing Examiner

Appeal Right and Valuation Notices

This decision is final and only subject to appeal to superior court as governed by Chapter 36.70C RCW. Appeal deadlines are short (21 days from issuance of the decision) and the courts strictly apply the procedural requirements for filing an appeal.